Brazos Transport Co. *and* International Brotherhood of Teamsters Local 997, AFL–CIO. Case 16–CA–15277

July 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge and an amended charge filed by the International Brotherhood of Teamsters Local 997, AFL–CIO, on October 21 and December 3, 1991, respectively, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on December 4, 1991, against Brazos Transport Co., the Respondent, alleging in substance that it violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to remit union dues and initiation fees to the Union and by failing to make pension and health and welfare fund payments, all as required by the terms of its collective-bargaining agreement with the Union.

On December 17, 1991, the Respondent responded to the complaint by letter from its vice president, Lowel Caddel. In the letter, the Respondent explained that Western American had stopped payment on checks given to the Respondent and consequently the checks given to the Union by the Respondent to cover all dues owed through October were returned by the bank. The Respondent claimed to have issued Comcheks to the Union on December 5, 1991, to pay all dues through December. The Respondent further stated that future dues would be deducted and paid to the Union. Finally, the Respondent admitted it had not contributed to the pension and the health and welfare benefits funds, citing financial problems as the reason for the nonpayment.

On March 4, 1992, the General Counsel sent the Respondent a letter advising that no answer had been received and further advising the Respondent that the General Counsel would move for summary judgment if no answer was received by the close of business March 11, 1992.

In a subsequent telephone conversation on March 12, 1992, the General Counsel advised Vice President Caddel that a Motion for Summary Judgment would be filed immediately. Caddel stated that the allegations of the complaint were true and, specifically, that while some dues had been remitted to the Union, the Respondent was still in arrears. Caddel also stated that contributions to the pension and the health and welfare benefits funds had not been made and that its failure to do so and to remit dues and initiation fees was solely a result of its financial inability to do so. The General Counsel confirmed this telephone conversation in a letter to the Respondent dated March 12, 1992.

On March 16, 1992, the General Counsel filed a Motion for Summary Judgment. On March 18, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent has not filed a response.

The National Labor Relations board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Because no response to the Notice to Show Cause was filed, the representations in the Motion for Summary Judgment are undisputed. See *Rubber Workers Local 250 (Mack-Wayne Closures)*, 305 NLRB 764 fn. 4 (1991). One of those undisputed representations is that the Respondent has effectively admitted in the March 12, 1992 telephone conversation all the allegations contained in the complaint.[1] Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Texas corporation, has been engaged in interstate and intrastate transportation of freight. During the 12 months preceding the issuance of the complaint, the Respondent, in the course and conduct of its above-described business operations in the State of Texas, derived gross revenue in excess of $50,000 for the transportation of freight in interstate commerce under arrangements with, and as an agent

[1] A claim of economic necessity, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by provisions of a collective-bargaining agreement. See *Raymond Prates Sheet Metal Co.*, 285 NLRB 194, 196 (1987).

In Member Oviatt's view, there may be limited circumstances in which an employer's financial inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To successfully make this defense, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In those circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act. *Tammy Sportswear Corp.*, 302 NLRB 860 fn. 1 (1991).

Those circumstances, however, are not present in this case. Member Oviatt finds that the Respondent's assertion in its December 17 letter to the Acting Regional Director that it was ''willing to bargain in good faith with the Union at such time when a reasonable and performable plan can be presented'' falls short of satisfying the requirements articulated above. Cf. *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).

for, Western America and C.A. White Trucking Company, common carriers operating between various States of the United States. Based on the above-described operations, the Respondent functions as an essential link in the transportation of freight in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that International Brotherhood of Teamsters Local 997, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers and maintenance employees that work for the Employer, excluding all other employees, office clerical employees, watchmen, guards, dispatchers, and supervisors as defined in the Act.

Since November 1987 and all material times thereafter, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive bargaining representative of the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from June 4, 1989, to June 2, 1990, and thereafter from year to year, unless either party served the other party with 60 days' notice of its desire to terminate the agreement. Pursuant to this provision, the effective term of the collective-bargaining agreement was extended to June 2, 1992.

Since about June 4, 1991, the Respondent has failed to continue in full force and effect all the terms and conditions of the agreement described above by failing to make contractually required deduction and remittance of union dues and initiation fees from the employees' wages to the Union[2] and by failing to make contractually required contributions to the pension fund. Since about July 1, 1991, the Respondent has failed to continue in full force and effect all the terms and conditions of the agreement described above by failing to make contractually required contributions to the health and welfare benefits funds. The Respondent engaged in the conduct described above without the Union's consent. The terms and conditions of the agreement that the Respondent has failed to continue in full force and effect are terms and conditions of employment of the employees in the above-described unit and are mandatory subjects for the purpose of collective bargaining. By the above conduct, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

[2] In its December 17, 1991 letter, the Respondent claims to have paid all dues through December 1991. The Respondent, however, admitted in its March 12, 1992 telephone conversation that it was still in arrears on dues payments. The amount of the arrerage is a matter we leave to the compliance stage of this proceeding.

CONCLUSION OF LAW

By failing and refusing to continue in full force and effect all the terms of the parties' collective-bargaining agreement by failing to make the contractually required deduction and remittance of union dues and initiation fees from the employees' wages to the Union and by failing to make the contractually required contributions to the pension and health and welfare benefits funds, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order that the Respondent make the contractually required dues and fees payments to the Union, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order that the Respondent make the contractually required pension and health and welfare benefits funds payments; any additional amounts applicable to such payments shall be made in accordance with the criteria set forth in *Merryweather Optical Co*., 240 NLRB 1213 (1979). We shall also order that the Respondent make whole the unit employees for any expenses ensuing from its failure to make the required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as computed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Brazos Transport Co., Cedar Hill, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the International Brotherhood of Teamsters Local 997, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit by failing and refusing to make contractually required contributions to the pension and the health and welfare

benefits funds and by failing to deduct and remit union dues and initiation fees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the contractually required contributions to the pension and the health and welfare benefits funds and make the contractually required deduction and remittance of union dues and initiation fees to the Union, in the manner set forth in the remedy section of this decision.

(b) Make unit employees whole by reimbursing them for any expenses ensuing from the failure to make the contractually required fund payments, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Cedar Hill, Texas, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the International Brotherhood of Teamsters Local 997, AFL–CIO as the exclusive collective-bargaining representative of our employees in the bargaining unit, by failing and refusing to make the contractually required deduction and remittance of union dues and initiation fees to the International Brotherhood of Teamsters Local 997, AFL–CIO and by failing and refusing to make the contractually required contributions to the pension and the health and welfare benefits funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the contractually required deduction and remittance of union dues and initiation fees, with interest, to the International Brotherhood of Teamsters Local 997, AFL–CIO and make the contractually required contributions to the pension and the health and welfare benefits funds.

WE WILL make unit employees whole by reimbursing them for any expenses ensuing from the failure to make the contractually required fund payments.

BRAZOS TRANSPORT CO.